Supreme Court, U.S.
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No. 01-1819

In The
Supreme Court of the United States

RICK SALGADO, *et al.*,

Petitioners,

v.

MIGUEL ROSALES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Are police officers entitled to qualified immunity when they ambush, without effective warning, a man running down a street with a gun from an area where several shots were fired?

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STATEMENT OF THE CASE

Respondent accepts Petitioners' statement of the procedural posture of the case, but rejects their characterizations of the decision of the Ninth Circuit Court of Appeals.

Factual Background

The facts, viewed in the light most favorable to the Respondent, the non-moving party below, are:

Petitioners, two off-duty Phoenix Police Officers, while working as private security guards at night in a restaurant parking lot in a high-crime area, heard a series of gunshots coming from an area about a block away. Shortly thereafter, they observed Respondent running in their direction at a jogging pace across a vacant lot. As Respondent stopped and waited for traffic to clear a street he had to cross, Petitioners decided, for tactical advantage, to conceal themselves behind parked cars and wait until Respondent had gone slightly past them before initiating a confrontation. As Respondent ran past them down the center of the street, one of the Petitioners shouted, "Stop, Phoenix Police," or similar words, and Petitioners immediately unleashed a fusillade of bullets at Respondent's back. Petitioner Salgado fired six times, rapid-fire, striking Respondent in the back of the elbow and behind the knee. Petitioner Lopez fired twice. Respondent was struck a third time from behind in the kidney area, but the bullet passed through his body and was not recovered, so which officer fired it is unknown.

The only justification for the shooting ever expressed by Petitioners at any time, in any of their many inconsistent sworn and unsworn statements, was that Respondent had turned and raised his weapon as if to fire at them. Petitioners conceded that, with respect to the gunshots they had heard, they didn't know whether Respondent was a victim (which he was), a perpetrator or uninvolved; that, prior to Respondent's alleged assault on the Petitioners, he was not a suspect in any crime and they did not consider him a fleeing felon; that running down a street in Phoenix with an unconcealed pistol in hand is not a crime.

Seeking to avoid the factual dispute that would defeat their qualified immunity claim, Petitioners conceded for the purpose of their motion that Respondent had not turned and raised his gun toward them.[1] In so doing, they substitute a hypothetical rationale for their conduct in place of the asserted factual one they have testified to repeatedly.

Several factual assertions made by Petitioners merit clarification:

- At the time they shot Respondent in the back, Petitioners did not know that the gunfire they heard came from a drive-by shooting as opposed to being, for example, random or celebratory, or whether it was gang-related, or that it was directed at a party taking place in a parking lot outside the home of Respondent's mother.

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[1] By conceding this point, Petitioners avoid the Court's examination of the internal contradictions of their own testimony and the physical evidence that is wholly inconsistent with Petitioners' version of the events.

- There is no evidence that the other two individuals whom Petitioners observed running were, or appeared to be, "companions" of Respondent.
- There is no evidence that Petitioners perceived Respondent to be "in apparent pursuit of another".
- Despite repeated references in the petition, there is no evidence that Respondent was "fleeing" before the verbal warning to stop.
- While Respondent heard the verbal warning to stop, the hail of police bullets immediately struck him, leaving him no time to react to the warning.
- Whether or not he intended to stop was unknown to Petitioners and, in any event, they did not wait to find out what Respondent's intentions were before shooting him down.
- There is no evidence on the record that Respondent posed even "a general threat to the community" much less a significant or specified threat to the officers or others.

REASONS FOR DENYING THE PETITION

Petitioners contend that their petition should be granted for the following reasons: (1) the application of the qualified immunity doctrine to deadly force actions "is wildly inconsistent within and without the Ninth Circuit" (Pet. at 9); (2) the Ninth Circuit, by deciding the *Garner* question against Petitioners in this case erroneously and automatically denied qualified immunity (Pet. at 7); (3) the Ninth Circuit relied on Petitioners' subjective beliefs for its qualified immunity analysis (Pet. at 8-9), rather than examining this case from the viewpoints of

reasonable officers on the scene (Pet. at 11). While Petitioners' "Question Presented" posits a violation of the second prong of the two-part test enunciated in *Saucier v. Katz*, 553 U.S. 194 (2001), namely, whether the law governing the officers' conduct was clearly established, their argument deals almost entirely with the first prong – whether the force used was excessive to begin with. The argument, which relies on Petitioners' version of facts which are in dispute, and on facts which were neither known nor apparent to Petitioners, is hopelessly muddled.

None of Petitioners' reasons justify the granting of this petition. First, the Ninth Circuit issued its unpublished memorandum after application of the two part *Saucier* test. Second, the Ninth Circuit's decision is not in conflict with this Court's precedent or the decisions of other circuits. Further review is unwarranted.

I. THE COURT CORRECTLY APPLIED THE *GRAHAM/GARNER* DEADLY FORCE TEST TO THE FACTS OF THIS CASE

In *Saucier*, this Court instructed lower courts deciding summary judgment motions based on qualified immunity to consider "this threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" 533 U.S. at 201.

Under the Fourth Amendment, police may use only such force as is objectively reasonable in light of the facts or circumstances confronting them. *Graham v. Connor*, 490 U.S. 386, 397 (1989). An officer's use of deadly force is reasonable only if "the officer has probable cause to believe that the suspect poses a significant threat of death or

serious physical injury to the officer or others." *Tennessee v. Garner*, 471 U.S. 1, 3 (1985). The reasonableness of the force used to effect a particular seizure is determined by "careful[ly] balancing ... 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396, quoting *Garner*, 471 U.S. 1. The force applied must be balanced against the need for that force.

Petitioners rely on information that became known to them after the incident to provide probable cause for shooting Respondent in the back. It is well settled law that probable cause must exist "at the moment the arrest was made"; it cannot be established by evidence made known to the police after the arrest is made. *Wong Sun v. United States*, 371 U.S. 471, 482 (1963); *Beck v. State of Ohio*, 379 U.S. 89, 91 (1964); *Allen v. City of Portland*, 73 F.3d 232, 236 (9th Cir. 1995).

In this case, Respondent was running down the street with a gun, away from an area where gunshots were heard. There is no evidence that Respondent was a fleeing felon, a suspect of anything or that any other person was in potential danger at that moment in time. Even if Petitioners perceived this as a potentially dangerous situation, they were not free to gun down the Respondent to end it. See *Deorle v. Rutherford*, 272 F.3d 1272, 1281 (9th Cir. 2001) ("A desire to resolve quickly a potentially dangerous situation is not the type of governmental interest that, standing alone, justifies the use of force that may cause serious injury. There must be other significant circumstances that warrant the use of such a degree of force at the time it is used.").

Petitioners concealed themselves from Respondent's view, one yelled, "Stop, Phoenix Police," and they immediately began shooting at Respondent. It is undisputed that the shooting was either simultaneous with the warning or came immediately thereafter, which essentially means there was no warning at all. As the facts play out, this was an ambush by two officers from concealed positions upon Respondent who was running down a street away from the officers' location when he was shot in the back.

It bears repeating that Petitioners did not shoot a suspected fleeing felon. They shot, they say, someone who was about to shoot them. Petitioners should not be able to avail themselves of a qualified immunity defense by cherry-picking the facts. If it were established that Respondent appeared to be trying to shoot them, they would clearly be entitled to qualified immunity even if he were not, in fact, trying to do that. But Petitioners cannot sterilize the facts and eliminate their stated reason for shooting, ignore the fact that no time at all elapsed between the command to stop and the gunshots and ignore the facts that they did not know whether he was victim or perpetrator and did not, in fact, believe that he was a suspect (i.e., fleeing felon).

Petitioners asserted in testimony that they only fired in self-defense when Respondent aimed his gun at them, a disputed fact. They adamantly maintained that they would not have fired otherwise, that they did not believe that he was a fleeing felon, that running with a gun is not a crime in Arizona. The first of these assertions is abandoned for purposes of the motion. The rest, claim Petitioners, are irrelevant. By layering fiction upon fiction we must eventually reach the anomalous conclusion that police may back-shoot anyone that some hypothetical

reasonable officer might have thought was a fleeing felon, though the officers involved in fact, did not.

Petitioners attempt to enlarge the proscription against inquiring into an officer's motives or intent to encompass as well what the officer knew or observed. The objective reasonableness test is designed to protect officers from liability for acting on the basis of reasonable mistakes of fact. The Ninth Circuit rightly looked to their own statements to determine what information the officers had and whether they acted upon such a mistake. The first prong of *Saucier* is met.

II. THE NINTH CIRCUIT CORRECTLY APPLIED THE SECOND PRONG OF *SAUCIER*

Just as the first prong of the *Saucier* test protects officers from liability for reasonable mistakes of fact, the second protects them from reasonable mistakes regarding the legality of their actions. "An officer might correctly perceive all of the relevant facts but have a mistaken understanding as to whether a particular amount of force is legal in those circumstances. If the officer's mistake as to what the law requires is reasonable, however, the officer is entitled to the immunity defense." *Saucier*, 533 U.S. at 205.

Therefore, the second question the court must ask is whether " 'the contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right.' " *Saucier*, 533 U.S. at 202 (quoting *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). The clearly established "inquiry . . . must be undertaken in light of the specific context of the case, not as a broad general proposition . . . " *Id.*, at 201, and with regard to the

law at the time of the alleged violations. See *Anderson*, 483 U.S. at 639. "The question is what the officer reasonably understood his powers and responsibilities to be, when he acted, under clearly established standards." *Saucier*, 533 U.S. at 208.

At this point, the futility of indulging in Petitioners' factual "concession" that Respondent did not turn and aim at them becomes clear. Under the "true" facts that they themselves insist upon in testimony, Petitioners had no misunderstanding at all of their powers and responsibilities: had Respondent not tried to take aim at them, they say quite correctly, they had no right to fire, and would not have fired, at him; since he did, they further say, they had every right to shoot. This is, of course, a correct understanding of the law, not a mistaken understanding, and the second prong of the *Saucier* test becomes irrelevant. Yet the Court is asked to ignore both their correct understanding and their stated reason for shooting, in order to conjure up a hypothetical reasonable officer to ratify conduct that they steadfastly maintain did not occur.

The relevant dispositive inquiry is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. *Saucier,* 533 U.S. at 202. An officer's entitlement to qualified immunity depends not on his subjective beliefs but rather on "the objective (albeit fact-specific) question whether a reasonable officer could have believed [the relevant conduct] to be lawful, in light of clearly established law and the information the . . . officers possessed." *Anderson*, 483 U.S. at 64; *Clem v. Corbeau*, 284 F.3d 543, 554 (4th Cir. 2002). The Court must consider the facts from the perspective of a reasonable officer *on the scene*, and avoid judging the

officer's conduct with the "20/20 vision of hindsight." *Graham* at 396, 397.

While it is true that the Court should not delve into an officer's motives or intentions this does not mean that the Court cannot consider or must disregard the officers' *perception of the circumstances at the scene*. The Ninth Circuit did nothing more nor less than this in looking again to Petitioners' own admissions to determine whether they had a reasonably mistaken belief as to the legality of shooting the Respondent in the back.

No reasonable officer could ever conclude that shooting an individual, suspected of nothing, in the back without warning under the circumstances here presented "was within the bounds of appropriate police responses." *Saucier*, 533 U.S. at 201. Qualified immunity was rightfully denied these Petitioners based on the facts presented and the application of the law.

CONCLUSION

The Ninth Circuit's Memorandum decision in this case fully comports with this Court's relevant decisions. Moreover, "A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Rule 10 of the Supreme Court. The Petition should be denied.

Respectfully submitted,

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